SERVED: January 23, 1992

NTSB Order No. EA-3473

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 8th day of January, 1992

BARRY LAMBERT HARRIS,
Acting Administrator,
Federal Aviation
Administration,

Complainant,

v.

STEPHEN J. FABER,

Respondent.

OPINION AND ORDER

Both the Administrator and the respondent have appealed from an initial decision of Administrative Law Judge William E. Fowler, Jr., issued orally at the conclusion of an evidentiary hearing held on June 16, 1989.[1] The law judge affirmed the Administrator's allegation that respondent violated § 91.9 of the Federal Aviation Regulations ("FAR," 14 C.F.R. Part 91) when, on June 20, 1986, respondent was

[1]An excerpt from the transcript containing the initial decision is attached.

forced to land his aircraft on a state highway after the fuel supply had been exhausted.[2] The law judge, however, reduced respondent's sanction from a suspension period of 30 to 20 days.

It is the Board's determination, after consideration of the briefs of the parties and the entire record, that safety in air commerce or air transportation and the public interest require that the Administrator's order be affirmed in its entirety. Therefore, we affirm the law judge's finding that a violation of FAR § 91.9 occurred, but reverse the suspension reduction and reinstate the original suspension period.

The order of suspension, which served as the complaint, reads, in part, as follows:

> "1. At all times material herein you were and are the holder of Private Pilot Certificate No. 1687216.
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> 2. On or about June 20, 1986, you, as pilot-in-command, operated civil aircraft N30583, a Cessna 210L, on a night cross country flight from Islip, New York with an intended destination of Peachtree-DeKalb, Airport, Atlanta, Georgia.
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> 3. The above flight terminated in an emergency landing on Interstate 400 near Gainesville, Georgia because of fuel exhaustion."[3]

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[2]FAR § 91.9 reads as follows:

"§ 91.9 Careless or reckless operation.
No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

[3]The Administrator corrected this allegation at the hearing by properly referring to the highway as State Highway 400.

Respondent maintains that the law judge erred because his conclusions were not based on a preponderance of reliable evidence. In addition, respondent claims that the law judge misapplied the Lindstam doctrine.[4] The Administrator, in his appeal, asserts that the law judge improperly reduced the suspension period originally imposed.[5]

Respondent does not dispute that, as a result of fuel exhaustion, he was compelled to make an emergency landing on a Georgia state highway. It is his contention, however, that he acted reasonably and responsibly. He claims that before take-off he first visually checked the fuel tanks to be certain that they were full, then determined that he had a sufficient fuel supply to safely fly from Islip Airport to Peachtree-Dekalb Airport. A defect in the aircraft, respondent maintains, caused the tanks to appear topped off when they were, in fact, not quite full. He reasons that he acted properly, not carelessly, because had the aircraft's fuel capacity been consistent with the description in the Cessna 210 owner's manual, he would have had sufficient fuel

[4] Administrator v. Lindstam, 41 CAB 841 (1964). See infra n. 8 and accompanying text.

[5] Respondent, in turn, filed a reply brief to which he appended copies of several magazine articles relating to, among other things, Cessna 210 fueling. The Administrator filed a motion to strike these materials since they are not part of the record. The Board has not considered these materials in evaluating the instant case and the motion to strike, to which no answer was filed, will be granted.

to make the trip.

The Administrator presented evidence at the hearing to prove that there was a relatively small difference between the fuel capacity as specified in the Cessna 210 owner's manual and the actual fuel capacity of the aircraft.[6] The testimony of an FAA aviation safety inspector and an aircraft maintenance supervisor established that a pilot who neglects to visually check the fuel level before take-off is careless. In addition, both the police officer who first arrived at the scene of the incident and an FAA flight standards inspector testified that respondent told them he had not looked inside the tanks to check the fuel level before take-off.[7]

Respondent maintains that the law judge erred by invoking the Lindstam doctrine.[8] He claims that he offered a reasonable explanation for why the fuel exhaustion occurred. We disagree. We think the Administrator, by

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[6]As respondent states in his brief, testimony at the hearing revealed that the aircraft actually held 85.4 gallons of fuel. The owner's manual described the aircraft as having a 90 gallon capacity, 89 of which were usable.

[7]The flight standards inspector opined that even if the tanks actually were filled to the top, it would be unsafe to attempt a flight to Atlanta without stopping to refuel. The maintenance supervisor reached a similar conclusion.

[8] "Under this doctrine, the Administrator can establish a prima facie case of carelessness by circumstantial evidence - namely, evidence of the circumstances surrounding the accident or incident coupled with evidence ruling out causes other than pilot error - and is not required to prove the specific act or acts of carelessness."

Administrator v. Davis, 1 NTSB 1514, 1516 n.6 (1972).

demonstrating that the fuel exhaustion was not caused by any mechanical deficiency in the aircraft, sufficiently established a prima facie case of carelessness that respondent did not refute.[9] We also think that, notwithstanding Lindstam, the evidence of respondent's failure to check the fuel tanks before take-off was sufficient to support the law judge's conclusion that the § 91.9 charge should be sustained.

Finally, we must address the reduction in sanction from 30 to 20 days of suspension. Under Administrator v. Muzquiz, 2 NTSB 1474 (1975), if a law judge affirms all findings of violations, then he must offer clear and compelling reasons for reducing the original sanction sought by the Administrator. In the instant case, the law judge found that respondent was careless in that he did not use "the judgment of a responsible, reasonable, and prudent pilot." Despite his conclusion, the law judge decided to give "some benefit of the doubt" to respondent, stating that "there is some difficulty in establishing when the [Cessna 210] tank is really full." While the record suggests that some extra effort may be involved in determining whether a Cessna 210's tanks are in fact topped off, we do not find this factor a clear and compelling reason for reducing the sanction in this

[9]The Administrator produced evidence showing that the aircraft's fuel tanks were virtually empty when it landed. After being refueled, the aircraft was checked for fuel leaks, but no leaks were found. It was then taken for a test flight, where it performed well.

case. The original 30-day suspension ordered by the Administrator is a reasonable sanction for a § 91.9 violation resulting from fuel exhaustion and is consistent with Board precedent. See, e.g., Administrator v. Funk, NTSB Order No. EA-2915 (1989) (60 days); Administrator v. Davis, NTSB Order No. EA-2761 (1988) (60 days); Administrator v. Rice, 3 NTSB 373 (1977) (30 days). We think this sanction is appropriate here.

We have reviewed the respondent's remaining arguments and the Administrator's reply to them and find that they warrant no comment.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is modified to affirm the Administrator's order; and
3. The 30-day suspension of respondent's private pilot certificate shall begin 30 days from the date of service of this order.[10]

KOLSTAD, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART, and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order. Member HART submitted the following concurring statement.

[10]For the purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).

CONCURRING STATEMENT BY ME-3
FOR NOTATION NO. 5620
December 12, 1991

Concurrence by Member Hart: I concur in the result, but I believe that the analysis should also note that because the flight was conducted IFR, respondent was required to have enough fuel to fly to his destination plus his alternate (if necessitated by the weather) plus 45 minutes. Because his fuel ran out 19 minutes short of his destination, he was short of his IFR-required fuel by more than an hour, even without considering any fuel for an alternate. Thus, not only was respondent careless at the beginning of the flight, in his failure to check the initial fuel quantity, but he was also careless thereafter, in his failure to monitor his fuel situation adequately during the flight.